

# Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402  
Phone 707-528-8175 Fax 707-528-8675  
lhm28843@sbcglobal.net



**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

August 13, 2015

Bruce E. Pherson, Jr., President  
Owners and Managers  
Boething Treeland Farms, Inc.  
23475 Long Valley Road  
Woodland Hills, CA 91367

**Re: Notice of Violations and Intent to File Suit Under the Clean Water Act**

Dear Mr. Pherson, Owners and Managers:

## **NOTICE**

The Clean Water Act § 505(b), 33 U.S.C. § 1365(b), (“CWA” or “Act”) requires that sixty (60) days prior to the initiation of a civil action under CWA § 505(a), 33 U.S.C. § 1365(a), a citizen must give notice of the intent to sue to the alleged violator with copy to the Environmental Protection Agency (“EPA”) (both local and federal), and the water pollution control agency for the State in which the violations occur. If the alleged violator is an individual or corporation, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the owner or managing agent with a copy sent to the registered agent of the corporation.

This Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the Act, 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at Boething Treeland Farms located at 23475 Long Valley Road in Woodland Hills, California.

River Watch hereby places Boething Treeland Farms (hereafter “Treeland Farms”) on notice that following the expiration of sixty (60) days from the date of this Notice, River Watch will have cause to file suit in the Federal District Court against Treeland Farms due to Treeland Farms’ continuing violations of “an effluent standard or limitation,” permit condition or requirement and/or “an order issued by the Administrator or a State with respect

to such standard or limitation” under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board, Los Angeles Region, Water Quality Control Plan (“Basin Plan”) as exemplified by Treeland Farms’ unlawful discharges of pollutants from its farm and retail store located at 23475 Long Valley Road in Woodland Hills, California (“the Site”) into Arroyo Calabasas, also known as Calabasas Creek, without complying with other required sections of the Act. See CWA § 301(a), 33 U.S.C. § 1311(a).

The Act regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that *all* discharges of pollutants are prohibited with the exception of several enumerated statutory exceptions. One such exception authorizes a discharger who has been issued a permit pursuant to the NPDES permitting system to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition.

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify:

1. The specific standard, limitation, or order alleged to have been violated.

River Watch has identified the discharge of pollutants from the Site to waters of the United States (Calabasas Creek) without complying with any other section of the Act, including CWA §§ 402(a) and 402(b), 33 U.S.C. § 1342(a) and 1342(b).

2. The activity alleged to constitute a violation.

The Act provides that, absent a permit and subject to certain limitations, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). River Watch contends Treeland Farms is discharging pollutants including the toxic metals barium, copper, molybdenum, nickel, and zinc as well as pathogens, fecal and total coliform, from the Site to Calabasas Creek without complying with other sections of the Act.

3. The person, persons or discharger responsible for the alleged violation.

The dischargers responsible for the alleged violations is Boething Treeland Farms, Inc. as well as those other persons who hold an ownership or operating interest in Treeland Farms.

4. The location of the alleged violation.

The location of the various violations is the permanent address of Treeland Farms at 23475 Long Valley Road in Woodland Hills, California, including the waters of Calabasas Creek – a water of the United States.

5. The date or dates of violation or a reasonable range of dates during which the alleged activities occurred.

The CWA is a strict liability statute with a five-year statute of limitations. Therefore, although River Watch alleges the illegal discharges of pollutants from the Site have been occurring for more than the statutory five year period, the range of dates covered by this Notice is August 13, 2010 through August 13, 2015. River Watch will from time to time update this Notice to include all violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. The full name, address, and telephone number of the person giving notice.

The entity giving notice is California River Watch, referred to throughout this notice as “River Watch,” an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation duly organized under the laws of the State of California. River Watch has a very active branch in Southern California. Its headquarters and main office are located in Northern California with a mailing address of 290 S. Main Street, #817, Sebastopol, California. River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org) or through its attorneys.

River Watch has retained legal counsel with respect to its concerns and the issues presented in this Notice. All communications regarding the same should be directed to:

Jack Silver, Esq.  
Law Office of Jack Silver  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Telephone: 707-528-8175  
Email: [lhm28843@sbcglobal.net](mailto:lhm28843@sbcglobal.net)

## **BACKGROUND**

Founded on 35 acres in 1952, Treeland Farms is a wholesale and retail plant farm based in California and headquartered at the Site which sells various plants, trees, shrubs,

roses, bedding plants, cactus, succulents, and vines to businesses and private individuals. Currently, Treeland Farms grows over 1,200 varieties of trees and shrubs on more than 800 acres in 10 farms throughout the State of California in coastal, desert, and interior regions, making it one of the largest wholesale growers of ornamental shrubs and trees in the West. Treeland Farms' customers include wholesalers and businesses, licensed contractors, builders, municipalities, garden centers, homeowners, landscapers, landscape architects, and other trade professionals.

The Site abuts the Arroyo Calabasas, also known as Calabasas Creek – an approximately 7 mile-long tributary of the Los Angeles River, located in the southwestern San Fernando Valley area of Los Angeles. The Creek begins at the merging of Dry Canyon Creek in the Santa Monica Mountains watershed and Dry Canyon Creek in the Simi Hills watershed (located in the Hidden Hills and Upper Las Virgenes Canyon Open Space Preserve), in proximity to the Town of Calabasas. From its source, Calabasas Creek flows northeast through Woodland Hills and Canoga Park where it joins Bell Creek (east of Canoga Park High School at Vanowen Avenue). This confluence marks the headwaters of the Los Angeles River. Calabasas Creek is encased entirely in a concrete flood control channel.

Numerous point sources exist within the Site including irrigation pipes, drip lines and equipment which discharges non-stormwater through these discrete conveyances. These non-stormwater discharges make their way to outfalls directly discharging to Calabasas Creek, a water of the United States. Recent sampling indicates that copper, nickel, and zinc are being discharged at concentrations above California Toxics Rule ("CTR") limits. The CTR limit for: copper is 9µg/l continuous, 13µg/l maximum; nickel 52µg/l continuous, 470µg/l maximum; and, zinc is 120µg/l continuous and maximum. Sampling from the outfalls from the Site to Calabasas Creek measured 24.7µg/l for copper, 33µg/l for nickel and 228µg/l for zinc. Flows were seen from these outfalls as being continuous in nature. Other metals being discharged include barium, recently measured at 383µg/l and molybdenum measured at 22.2µg/l. Coliform and fecal coliform are also discharging from the Site. Total coliform was measured at >1600 MPN/100ml and fecal coliform at 140 MPN/100ml. The Los Angeles River and its main tributaries are CWA § 303(d) lists as impaired for indicator bacteria.

Copper, nickel, and zinc are listed as toxic pollutants under 40 C.F.R. § 401.15 and by the federal Environmental Protection Agency ("EPA"). They are among 126 priority pollutants for which the EPA has developed standardized analytical test protocols (EPA methods). The Los Angeles River and its main tributaries are CWA § 303(d) listed as impaired for zinc, copper, and pathogens. For waters like the Los Angeles River which have not yet met water quality standards, the addition of unpermitted loads "contribute to excursions above water quality standards" since any additional discharge makes it that much more difficult to improve water quality to levels that satisfy those water quality standards.



This is especially true of discharges that are not included in the loading calculations, such as those from commercial operations on the Site.

The definition of “pollutant” as defined in the CWA is extremely broad. 33 U.S.C. § 1362(6); *see also Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155, 1162-1163 (9<sup>th</sup> Cir. 2003). There is no dispute that the copper, nickel, zinc, barium, molybdenum, vanadium, and fecal and total coliform contained in the discharges from Site’s stormwater system are pollutants as defined under the Act. *See also Sierra Club v. Cedar Point Oil Company Inc.* 73 F.3d 546, 566 (5<sup>th</sup> Cir. 1996) [That the definition of “pollutant” is meant to leave out very little is confirmed by the statutory definition of “pollution,” which means nothing less than the “man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. § 1362(19).]

Under the Act, “the term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14). Treeland Farms’ stormwater system clearly meets this definition. *See also Northwest Envt’l Defense Ctr. v. Brown*, 640 F.3d 1063 at 1071 (9<sup>th</sup> Cir. 2011) [“Storm sewers are established point sources subject to NPDES permitting requirements . . .” quoting *Environmental Defense Center v. EPA*, 344 F.3d 832, 841-842 n. 8 (9<sup>th</sup> Cir. 2003)]. The Ninth Circuit has ruled that the collection, channelization and release to a water of the United States is a “discharge” under the CWA. *Committee to Save the Mokelumne v. East Bay Municipal Utility District*, 13 F.3d 305, 308-309 (9<sup>th</sup> Cir. 1993).

Multiple sources of pollution generated through activities on the Site such as vehicular and building maintenance, landscaping and maintenance of grounds, vehicular traffic, sewage and garbage, make their way to Treeland Farms’ system of storm drains connected to the Los Angeles River. Results from recent sampling tests indicate non-stormwater discharges of pollutants from the Site exceed water quality standards. River Watch’s ongoing investigation indicates a lack of any effective structural Best Management Practices (“BMPs”) in place at the Site to prevent maintenance waters from coming into contact with pollutant sources and/or water treatment measures to prevent contaminants from being discharged from the Site without treatment in or around the storm drains.

Under EPA regulations, water quality standard based provisions are required in NPDES permits to protect the beneficial uses of water. 40 C.F.R. § 122.44(d). The RWQCB has identified beneficial uses of the Los Angeles River region’s waters and has established water quality standards for the Los Angeles basin. The beneficial uses of these waters include, among others, contact and non-contact recreation. The non-contact recreation use

is defined as use of water for recreational activities involving proximity to water, but not normally involving contact where water ingestion would be reasonably possible such as picnicking, sunbathing, hiking, camping, boating, hunting, sightseeing, or aesthetic enjoyment in conjunction with those activities. Water quality considerations relevant to hiking, camping, boating, and activities related to nature studies, require protection of habitats and aesthetic features.

The Basin Plan includes a narrative toxicity standard which states that all waters shall be maintained free of toxic substances in concentrations that are lethal or that produce other detrimental responses in aquatic organisms. The Basin Plan includes a narrative oil and grease standard which states that waters shall not contain oils, greases, waxes, or other materials in concentrations that result in a visible film or coating on the surface of the water or on objects in the water, that cause nuisance, or otherwise adversely affect beneficial uses. The Basin Plan establishes Water Quality Objectives for toxic metals such as copper, nickel, and zinc.

The EPA adopted the National Toxics Rule on February 5, 1993 and the California Toxics Rule on May 18, 2000. When combined with the beneficial use designations in the Basin Plan, these Rules contain water quality standards applicable to the discharges from the Site identified in this Notice. The State Water Resources Control Board adopted the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* on April 26, 2000, containing requirements for implementation of both the National Toxics Rule and CTR.

## **VIOLATIONS**

River Watch alleges that from August 13, 2010 through August 13, 2015, Treeland Farms has violated the CWA by discharging pollutants from the Site into waters of the United States without complying with any other section of the Act, including CWA §§ 402(a) and 402(b). Each and every discharge is a separate violation of the CWA. These enumerated violations are based upon River Watch's own investigations, review of the RWQCB files for Treeland Farms, interviews with area residents, and review of other files publically available.

In addition to the above violations, this Notice is deemed to include any and all violations evidenced by Treeland Farms' records and monitoring data which Treeland Farms has submitted (or failed to submit) to the RWQCB and/or other regulatory agencies during the period August 13, 2010 through August 13, 2015. This Notice also includes any and all violations which may have occurred but for which data may not have been available or submitted or apparent from the face of the reports or data submitted by Treeland Farms to the RWQCB or other regulatory agencies.

Observations indicate that the discharge from the Site is continuous in nature and therefore the violations of the CWA are continuous in nature. It also appears that every discharge to storm drains at the Site exceeds one or more applicable water quality standard.

## CONCLUSION

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any “person,” including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), § 1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$37,500 per day/per violation for all violations pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Notice sufficiently states grounds for filing suit in federal court under the “citizen suit” provisions of CWA to obtain the relief provided for under the law.

The violations by Treeland Farms as set forth in this Notice affect the health and enjoyment of River Watch members who reside, work and recreate in the affected area. River Watch members use the Los Angeles River and its watershed for domestic water supply, agricultural water supply, recreation, photography, nature walks and the like. Their health, property rights, use and enjoyment of this area is specifically impaired by Treeland Farms’ violations of the CWA as described herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations noted in this Notice. However, if Treeland Farms wishes to pursue such discussions in the absence of litigation, it is suggested that those discussions be initiated within the next **20 days** so that they may be completed before the end of the **60-day** notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that period ends.

Very truly yours,



Jack Silver

JS:lhbm

cc: Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Executive Director  
Regional Water Quality Control Board, Los Angeles Region  
320 W. 4<sup>th</sup> St. Suite 200  
Los Angeles, CA 90013

Thomas Howard, Executive Director  
Felicia Marcus, Board Chair  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

Marji Elizabeth Boething, Registered Agent  
Boething Treeland Farms, Inc.  
26049 Mulholland Hwy.  
Calabasas, CA 91302